Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

No. 99-301

In The

Supreme Court of the United States

HOLYWELL CORPORATION,

Petitioner,

vs.

THE BANK OF NEW YORK and
FRED STANTON SMITH, as Trustee of the
MIAMI CENTER LIQUIDATING TRUST,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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September, 1999

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QUESTION PRESENTED

Whether the court of appeals, district court, and bankruptcy court correctly exercised their discretion in denying the Petitioner's motion to vacate, on the basis of Fed. R. Civ. P. 60(b), a bankruptcy court order entered over seven years ago?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

Introduction 1

The Rule 60(b) Attacks 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. INTRODUCTION 4

II. THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION 4

A. The Rule 9024 Motion Was Untimely 5

B. The Grounds Raised by the Petitioner Are Barred by the Res Judicata and Mootness Doctrines 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Ackerman v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) 7

Braxton v. United States, 500 U.S. 344 (1991) 1

Holywell Corp. v. Smith, 503 U.S. 47 (1992) 1

In re Holywell Corp., 967 F.2d 568 (11th Cir. 1992) 2

Transit Cas. Co. v. Security Trust Co., 441 F.2d 788 (5th Cir. 1971) 7

OTHER AUTHORITIES

11 U.S.C. § 1141(d) 7

11 U.S.C. § 1144 5

11 Wright and Miller, Fed. Practice and Pro.: Civil § 2857 (1995) 4, 7

28 U.S.C. § 1254(1) 1

9 *Collier on Bankruptcy* ¶ 7001.10 at 7001-24 (15th ed. 1994) 3

Fed. R. Civ. P. 60(b) 2, 3, 4, 5, 6, 7

Federal Rule of Bankruptcy Procedure, Rule 7001(7) 3

Federal Rule of Bankruptcy Procedure, Rule 9024 ..... 3, 5, 6, 7

Sup. Ct. R. 10.1(a) through (c) 1

STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the fifteenth attempt by the debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, over 30 appeals to the court of appeals, and over 80 appeals in the district court, in the

[1] Of the 15 petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed; *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

ten years since a creditors' plan of reorganization was confirmed.

For their serial, collateral attacks, the debtor/Petitioner and its counsel here have been sanctioned on several occasions. For example, after a series of losses in the bankruptcy court, the Petitioner and its counsel tried to circumvent the Florida bankruptcy court by filing lawsuits against Respondents in Virginia and in the state court in Florida, for which the bankruptcy court in Florida then imposed some $138,000 in sanctions against the Petitioner, principal of the Petitioner and their counsel.[2]

The present Petition is also frivolous.[3]

The Rule 60(b) Attacks

In 1994, the debtor/Petitioner filed a motion under Federal Rule of Bankruptcy Procedure, Rule 9024 (which adopts Federal Rule of Civil Procedure, Rule 60(b)), asking the bankruptcy court to vacate the August 8, 1985 order substantively consolidating the debtors' estates.

The motion sought to unravel the substantive consolidation feature of the Plan of Reorganization over seven years after substantial consummation of the Plan. It also sought an order compelling the Respondent Trustee, "to enforce the Bank of New York's indemnification for $189,372,757", despite the bankruptcy court's prior ruling

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[2] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[3] The debtor/Petitioner and its counsel have been held in contempt and sanctioned repeatedly for attempting to relitigate previously decided issues, and for attempts to circumvent bankruptcy court rulings.

that the Petitioner and its principal (Theodore B. Gould) had no claims against the Trustee or the Bank.[4] The motion sought "equitable relief" and a mandatory injunction to compel the Trustee to take certain actions, but it was not filed as an adversary proceeding as required.[5]

Gould, the principal of the Petitioner and himself a co-debtor, argued the Motion on January 19, 1994, although he is not an attorney. Gould never detailed specific reasons for relief under Bankruptcy Rule 9024 or Fed. R. Civ. P. 60(b)(5) or (6), and neither his argument nor this Petition mentioned the portion of the motion seeking an order to compel the Trustee to recover Gould's claims for over $189 million.

The motion was denied by the bankruptcy court, which found the motion, "to be another thinly disguised and untimely motion to vacate the plan." (Petitioner's App. 10). The district court affirmed (Petitioner's App. 3), as did the court of appeals (Petitioner's App. 1).

This Petition followed.

SUMMARY OF ARGUMENT

The bankruptcy court, district court, and court of appeals correctly determined that the motion was procedurally defective. The "Rule 60(b)" part of the motion,

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[4] The Petitioner subsequently increased the demanded sum to $223,266,587.00 (Petitioner's App. 4).

[5] Federal Rule of Bankruptcy Procedure, Rule 7001(7). 9 *Collier on Bankruptcy* ¶ 7001.10 at 7001-24 (15th ed. 1994).

which is the only part subject to this Petition,[6] was untimely, failed to state any appropriate basis for relief, and was barred by previous rulings in these cases. The bankruptcy court did not abuse its discretion in denying the motion, and the district court and court of appeals correctly affirmed. Accordingly, the Petition should be denied.

ARGUMENT

I. INTRODUCTION

The Petition consists of 30 pages of recrimination against 10 years of prior rulings in these cases. The 1984 cash collateral order (Petition at p. 5), the 1985 confirmation order as modified on remand in 1986 (*id.* at p. 13), and numerous other rulings are rehashed as if they provided some basis to re-open a material term of the confirmed Plan. They do not.

II. THE LOWER COURTS DID NOT ABUSE THEIR DISCRETION

The standard for the review of a judicial determination applying Rule 60(b) is the "abuse of discretion" standard. 11 Wright and Miller, Fed. Practice and Pro.: Civil § 2857 (1995). This Court does not exist to review for a third time the bankruptcy court's exercise of discretion

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[6] The "motion to enforce" was not brought as an adversary proceeding, was barred by prior rulings, and was essentially abandoned by the appellants below, and by the Petitioner here.

already reviewed twice by the district court and court of appeals.

A. The Rule 9024 Motion Was Untimely.

Bankruptcy Rule 9024 provides:

> Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1130.

A motion under this Rule seeking revocation of an order of confirmation – the purpose and effect of the motion, since substantive consolidation was a principal element of the Plan – must be brought "before 180 days after the date of the order of confirmation"; after that time, revocation requires proof that the order, "was procured by fraud". 11 U.S.C. § 1144. In this case, the motion was filed over seven years after the confirmation order, and no evidence of fraud was offered or found.[7]

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[7] The Petitioner appears to confuse a judgment procured by fraud with the constructive fraud theory of fraudulent conveyance. The Petitioner argues that the substantive consolidation ruling was incorrect, and that as a result of the erroneous judgment the Respondents received property to

The lower courts thus held, as one alternative basis for their decisions, that the Petitioner's motion was untimely (Petitioner's App. 2, 5-6, 11). This Court's tax opinion was rendered on February 25, 1992, but the Petitioner did not file its motion until April, 1993. The Petitioner has not shown that this determination by the district court was an abuse of discretion.

B. The Grounds Raised by the Petitioner Are Barred by the Res Judicata and Mootness Doctrines.

The lower courts found that the grounds asserted by the Petitioner were barred by the doctrine of res judicata insofar as they have been raised, and rejected, numerous times before. (Petitioner's App. 2, 5-6, 11). They also found the grounds barred by the mootness doctrine. (*Id.* at 2, 6-7, 11). The Petitioner apparently concedes these points, but asserts that the doctrines are inapplicable to the Petitioner on grounds of "equity". The Petitioner does not, however, explain why it was an abuse of discretion for the lower courts to apply the doctrines.

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which they were not entitled, the receipt of which the Petition terms a "fraudulent conveyance". (Petition at 20-24). It is this "fraud" theory that the Petitioner argues justifies relitigation. Such a "fraud" theory would apply to every judgment argued to be incorrect and render meaningless the requirements of Federal Rule of Bankruptcy Procedure, Rule 9024 (adopting Federal Rule of Civil Procedure, Rule 60(b).)

It is just this sort of endless reargument of previously-decided issues that has caused the Petitioner and its counsel to be sanctioned under Bankruptcy Rule 9011.[8]

Rule 60(b)(6), relied upon by the Petitioner, is a "catchall" provision for "any other reason justifying relief". This subsection is reserved for cases involving "extreme hardship or injustice"[9] and "extraordinary cases".[10] Holywell received a discharge under 11 U.S.C. § 1141(d) as a result of the confirmation of the Bank's Plan. It was thereby given a "fresh start" and relieved of over $300 million in debts.

In view of the broad discretion afforded trial courts under Bankruptcy Rule 9024 and Fed. R. Civ. P. 60(b),[11] it is clear that the bankruptcy court did not err in denying the motion.

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[8] Over $24,000 in sanctions was imposed on the Petitioner, its principal, Gould, and their attorney Musselman for frivolous re-argument. They have all also been held in contempt for the same reason.

[9] *Transit Cas. Co. v. Security Trust Co.*, 441 F.2d 788, 792 (5th Cir. 1971).

[10] *Ackerman v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207, 212 (1950).

[11] Wright & Miller notes, at § 2872, that the trial court is "given a very large measure of discretion in passing on those motions", and that "the appellate courts pay considerable deference to that discretion". *Id.* at 261 (1994).

CONCLUSION

None of the appropriate grounds for *certiorari* are present. The three lower courts ruled correctly and unanimously. Their respective decisions were well within their discretion. For all these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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